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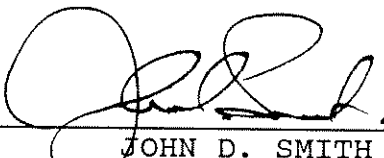
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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

MARCH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

In re:)	1990 OAL Determination No. 7
Request for Regulatory)	
Determination filed by)	[Docket No. 89-013]
the Associated Sales Tax)	
Consultants, Inc.)	March 23, 1990
concerning the Board of)	
Equalization's "Audit)	Determination Pursuant to
Manual" section 1004.40,)	Government Code Section
subd. (e) regarding)	11347.5; Title 1, California
whether the distribution)	Code of Regulations,
of assets prior to 80%)	Chapter 1, Article 2
completion of a joint)	
venture project)	
constitutes a sale)	
subject to Sales and Use)	
Tax)	

Determination by:


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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a rule in the Board of Equalization's Audit Manual -- providing that withdrawals of assets by a member or members of a joint venture prior to 80% completion of the venture are sales of the property transferred and are not liquidating dividends and hence subject to Sales and Use Tax -- is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that this "80% completion rule" for joint venture asset withdrawals or distributions is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not a rule contained in the State Board of Equalization's ("Board") Audit Manual, section 1004.40, subdivision (e) -- providing that withdrawals of assets by a member or members of a joint venture prior to 80 percent completion of the venture are sales of the property transferred and not liquidating dividends and hence subject to Sales and Use Tax (the "80% completion rule") -- is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.

THE DECISION ^{4, 5, 6, 7, 8}

OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the Administrative Procedure Act ("APA");
- (2) the Board's "80% completion rule" is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) this rule does not fall within any established general exception to APA requirements; and therefore
- (4) this rule violates Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The State Board of Equalization ("Board") was created by former Article 13, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in California Constitution, Article 13, section 17. The Board is charged with administering numerous tax programs, including the Sales and Use Tax, for the support of state and local governmental activities. The Board also has major responsibilities in providing rules and regulations governing the Property Tax. As an appellate body, the Board hears appeals in a number of different areas, including the Sales and Use Tax, Property Tax, the Personal Income Tax, and the Bank and Corporation Tax.

Authority ¹⁰

The Board has been granted authority to adopt rules and regulations governing the Sales and Use Tax. Revenue and Taxation Code section 7051 provides:

"The board shall enforce the provisions of this part [Part 1 of Division 2 of the Revenue and Taxation Code -- "Sales and Use Taxes"] and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part. The board may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect." [Emphasis added.]

Background: Relevant Sales and Use Tax Law

To facilitate understanding of the issues presented in this Determination, we set forth the following provisions of the Sales and Use Tax law (statutes and regulations) of particular relevance to this Request.

Revenue and Taxation Code section 6051 imposes a Sales Tax upon the gross receipts of any retailer from the sale of all tangible personal property sold at retail in the State of California. For purposes of this tax, "sale" is broadly defined to include, among other items, "[a]ny transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration."¹¹

Operating in conjunction with the Sales Tax is the Use Tax. Revenue and Taxation Code section 6201 imposes the Use Tax upon the storage, use, or other consumption in the State of California of tangible personal property purchased from any retailer.

One exemption from the Sale and Use Tax is for "occasional sales." Revenue and Taxation Code section 6367 provides, in part, the following:

"There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use, or other consumption in this state of tangible personal property, the transfer of which to the purchaser is an occasional sale" [Emphasis added.]

The term "occasional sale" is defined in Revenue and Taxation Code section 6006.5 to include several different categories of transactions. The portion of section 6006.5 relevant to this Request provides:

"'Occasional sale' includes all of the following:

"

"(b) Any transfer of all or substantially all the property held or used by a person in the course of those activities [activities requiring a seller's permit or permits] when after the transfer the real or ultimate ownership of the property is substantially similar to that which existed before the transfer. For the purposes of this section, stockholders, bondholders, partners, or other persons holding an ownership interest in a corporation or other entity are regarded as having the 'real or ultimate ownership' of the property of the corporation or other entity. . . ." [Emphasis added.]

The "occasional sale" exemption to the Sales and Use Tax is further defined in Title 18, California Code of Regulations ("CCR"), section 1595, "Occasional Sales--Sale of a Business--Business Reorganization." The provision of regulation section 1595 most relevant to this Request is subsection (b)(2), "Transfers of Substantially All Property Without Substantial Change in Ownership." Section 1595, subsection (b)(2), provides, in part, the following:

"Tax does not apply to a transfer of all or substantially all the property held or used by a person in the course of activities for which the person is required to hold a seller's permit or permits or would be required to hold a seller's permit or permits if the activities were conducted in this state, provided that

after the transfer the real or ultimate ownership of the property is substantially similar to that which existed before such transfer.

"Substantially all the property' means 80 percent or more of all the tangible personal property held or used in the course of activities, including tangible personal property located outside of this state. . . .

"The real or ultimate ownership is 'substantially similar' to that which existed before a transfer if 80 percent or more of that ownership of the tangible personal property is unchanged after the transfer" [Emphasis added.]

In other words, the Sales and Use Tax "occasional sale" exemption for "transfers of substantially all property without substantial change in ownership" generally requires:

- (1) a transfer of substantially all (80% or more) of the tangible personal property held or used in the course of activities, and
- (2) ownership of the property after the transfer which is substantially similar to that which existed before the transfer (80% or more of the ultimate ownership unchanged).

Background: This Determination

This Request for Determination was filed by Associated Sales Tax Consultants (the "Requester") "on behalf of our clients Dillingham Construction Corporation, other related Dillingham corporations, joint ventures with a Dillingham corporation as a joint venture member, and ourselves."¹² This Request has its origins in the Board's Sales and Use Tax audits of various Dillingham Construction Corporation ("Dillingham") entities and joint ventures, as discussed below.

According to the Requester, one of the Dillingham corporations, along with other unrelated construction companies, formed joint ventures to build large construction projects. At the commencement of these joint venture projects, the Dillingham joint venture member, along with the other joint venture members, would contribute construction equipment to the joint venture and, in return, receive equity in the joint venture. As a joint venture construction project progressed, contributed equipment which was no longer needed by the joint venture would be distributed to the various joint venture members. The contributed equipment was normally returned to the joint venture member who originally contributed the equipment.

The Board's audit staff performed Sales and Use Tax audits of the Dillingham entities and joint ventures. The audit staff characterized certain distributions of equipment by the Dillingham joint ventures as transactions subject to the Sales and Use Tax. In making these audit adjustments, the audit staff, at least in some instances, applied an "80% completion rule" to the distributions of equipment. If the distribution of equipment occurred prior to 80% completion of the joint venture project, the distribution was treated as a sale or transaction subject to tax. If the distribution of equipment occurred after 80% completion of the joint venture project, the distribution was treated as a "liquidating dividend" exempt from tax.¹³

The Board's audit staff utilizes an "Audit Manual" as a guide in performing Sales and Use Tax audits. In the area of "Occasional Sales -- Sale of a Business," section 1004.40 of the Audit Manual, entitled "Transfer of Property by a Partnership," includes a provision on the transfer of property by joint ventures. Section 1004.40, subdivision (e), states:

"Joint Ventures. A joint venture is similar to a partnership. The main difference between the two entities is that the joint venture is formed for a specific project. Upon dissolution of the joint venture, property transferred to the members will be considered a liquidating dividend and not subject to the tax.

"Withdrawals of assets by a member or members of a joint venture prior to 80 percent completion of the venture are sales of the property transferred and are not liquidating dividends and hence are subject to the tax.

"Sales of property by the venture to members or other persons are not occasional and are therefore subject to the tax.

"Sale of a member's interest in the venture to the other members or another person will be considered occasional unless he himself is a retailer by virtue of a series of sales." [Emphasis added.]

As is evident above, this subdivision of the Audit Manual sets forth an "80% completion rule" with regard to the taxability or non-taxability of joint venture asset withdrawals/distributions. The Requester asserts in the Request for Determination that the Board's audit staff (and ultimately the Board itself) applied this Audit Manual provision in assessing tax on certain joint venture asset distributions made prior to 80% completion of the joint venture projects.

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After receiving "notices of determination" claiming additional Sales and Use Tax due, the Dillingham entities and joint ventures appealed the audit assessments, filing "petitions for redetermination." The petitions for redetermination included appeals of the portions of the assessments pertaining to the joint venture asset distributions, among other issues. A preliminary hearing on the petitions was held before one of the Board's "hearing officers" on February 19, 1987. The hearing officer's "decision and recommendation" reports, dated April 2, 1987, upheld the assessments made by the Board's audit staff (except for the deletion of failure-to-file penalties). The hearing officer specifically addressed the question of the joint venture asset withdrawals/distributions and concluded that "[t]hese withdrawals were taxable and did occur prior to 80 percent completion of the projects."

The Dillingham petitions for redetermination were ultimately considered by the Board itself. At its July 28, 1988 meeting, the Board concluded that the penalties should be deleted and "that the deficiency determinations be redetermined without further adjustment." In other words, the Board upheld the Sales and Use Tax assessments made by the audit staff (except for the penalties), including the portions of the assessments based upon the taxation of the joint venture asset distributions. The Board apparently did not issue a decision detailing its rationale with respect to the taxability of these joint venture asset withdrawals or distributions.

After the Board's consideration of the petitions for redetermination, at least three of the Dillingham entities paid the alleged Sale and Use Tax deficiencies and filed claims for refund with the Board. The claims for refund were denied. Subsequently, in May and July of 1989, three Dillingham entities filed legal actions against the Board in the Sacramento County Superior Court.¹⁴ Among the issues raised in these three lawsuits were the taxability of the joint venture asset distributions and whether Audit Manual section 1004.40, subdivision (e), was utilized as a rule of general application without having been properly adopted under the APA.

On August 18, 1989, the Associated Sales Tax Consultants, Inc. submitted to OAL a Request for Determination "regarding use by the California State Board of Equalization of Audit Manual Section 1004.40, subdivision (e) as a basis to assert tax liability." Specifically, the Requester objects to the following sentence of Audit Manual section 1004.40, subdivision (e): "Withdrawals of assets by a member or members of a joint venture prior to 80 percent completion of the venture are sales of the property transferred and are not liquidating dividends and hence are subject to the tax."

The Requester asserts that this "80% completion rule" is a "regulation" which was utilized by the Board without having been properly adopted under the APA.

On January 5, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁵ along with a notice inviting public comment.

On February 13, 1990, OAL received the Board's Response to the Request for Determination. The Board requests that OAL withdraw from further consideration of this Request because the parties on whose behalf the Request was submitted had previously submitted the same question to the Sacramento County Superior Court in three different complaints against the Board for refund of Sales and Use Tax. Alternatively, the Board asserts that Audit Manual section 1004.40, subdivision (e), is not a "regulation" as defined in Government Code section 11342, subdivision (b), but, instead is a "flexible auditing procedure or technique."

II. DISCUSSION OF PRELIMINARY ISSUE

WHETHER OAL SHOULD WITHDRAW FROM CONSIDERATION OF THIS REQUEST FOR DETERMINATION BECAUSE OF COURT PROCEEDINGS FILED PRIOR TO THE FILING OF THE DETERMINATION REQUEST INVOLVING THE SAME PARTIES AND THE SAME APA "REGULATION" ISSUE.

As mentioned above, the Board requests in its Response to the Request for Determination that OAL withdraw from further consideration of this Request. The Board bases its withdrawal request on the fact that three of the Dillingham entities on behalf of whom this Request for Determination was submitted had previously submitted the same question (i.e., whether the "80% completion rule" is a "regulation" required to be adopted under the APA) to the Sacramento County Superior Court in three different complaints against the Board for refund of Sales and Use Tax. The first court complaint was filed May 30, 1989 and the second and third complaints on July 6, 1989. The Request for Determination was filed later on August 18, 1989.

In stating its position that OAL should withdraw from this Request, the Board largely relies upon the language of Government Code section 11347.5, subdivision (e), which states:

"A determination issued by [OAL] pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all the following occurs:

- (1) The court or administrative agency proceeding involves the party that sought the determination from [OAL].
- (2) The proceeding began prior to the party's request for [OAL's] determination.
- (3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342."

The Board asserts that the three factors set forth in Government Code section 11347.5, subdivision (e), are operative with respect to this Request for Determination (i.e., the court proceedings (1) involve the same party seeking the Determination, (2) were filed prior to the Request for Determination, and (3) involve the same issue as to whether the challenged rule is a "regulation" as defined in Government Code section 11342, subdivision (b)). The Board states:

"The result of all three factors being satisfied is that any determination issued by the OAL shall not be considered by the court. The court will give its opinion as to whether Audit Manual 1004.40(e) must be adopted as a 'regulation' independently of any determination by the OAL and will, of course, further decide what effect that has on Dillingham's right to receive a refund. As to such court actions, any determination by OAL will be irrelevant, and rightfully so, since one of the legislative purposes of Government Code Section 11347.5(e) is to discourage litigants from filing requests with the OAL in an attempt to influence a court's decision in previously filed litigation. Dillingham is making just such an attempt to influence litigation by its Request to OAL. The OAL should further such legislative intent by withdrawing from any further consideration of the Request and thereby avoid a duplicative consideration of the same question."¹⁶

The Board further states: "Nor is it an answer to our argument that the OAL should withdraw to say that the court actions will only decide whether Audit Manual 1004.40(e) is a 'regulation' as between Dillingham and the Board, while an OAL determination would apply to all sales and use tax matters."¹⁷ In this regard, the Board essentially presents the view that the litigation will most likely resolve the "regulation" issue for all interested persons and that the Board will formally adopt any regulations which might be necessary after the court interprets the law in this area of joint venture asset distributions.

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OAL has reviewed the Board's request that it withdraw from further consideration of this Request for Determination. OAL must reject the Board's request for withdrawal for the reasons specified below.

First, Government Code section 11347.5, subdivision (e), is a prohibition solely on the action of the courts, not a prohibition or limitation on the actions of OAL. This statutory provision merely says that a court (or an administrative agency in an adjudicatory proceeding) shall not consider an OAL Determination where the court or administrative agency proceeding involves the same party as the Determination, involves the same "regulation" issue as the Determination, and the court or administrative agency proceeding began prior to the Request for Determination. Government Code section 11347.5, subdivision (e), in no respect constrains OAL (or implies a constraint upon OAL) in its consideration of a Request for Determination filed after a related court proceeding has commenced.

Second, the Board asserts that OAL should "further . . . legislative intent by withdrawing from any further consideration of the Request" The Board does not cite, and OAL is not aware of, any specific legislative history which would indicate that OAL should withdraw from consideration of a Request for Determination under the conditions set forth in Government Code section 11347.5, subdivision (e). Furthermore, the mere presence of this statutory provision (prohibiting the consideration of a Determination by the courts where the court action was filed before the Request for Determination) would tend to indicate that the Legislature, in fact, contemplated that OAL would continue to issue Determinations even where the matter was also being considered by a court in a earlier-filed action.

Third, the issuance of a Determination on this matter by OAL will not, as the Board implies, improperly "influence the court." Certainly the court is capable of complying with the prohibition (on considering a Determination) contained in Government Code section 11347.5, subdivision (e), where that prohibition is, in fact, applicable.

Fourth, OAL should continue to consider this Request for Determination because there is a very real possibility that the issue of whether the provision of Audit Manual section 1004.40 is a "regulation" may not be resolved in the court actions. For example, the court cases may be dismissed, settled, or otherwise resolved before the issuance of a court decision. The court could potentially make a decision on other grounds without reaching the question of whether the "80% completion rule" for joint venture distributions is a "regulation." It is also possible that this APA issue could be decided only at the Superior Court level without

appellate court review, leaving no precedent or published opinion and essentially failing to address the issue as it relates to other audits and other taxpayers. In other words, there are numerous scenarios in which the court actions might not resolve the APA issue which has been raised in both the court proceedings and in the Request for Determination. Both the Requester and potentially other persons have an interest in resolving the question of whether the "80% completion rule" is a "regulation." Therefore, OAL must continue to consider this Request.

Finally, section 123 of Title 1 of the CCR provides that "[a]ll requests for determination which meet the requirements of Section 122 of these regulations shall be considered by [OAL] in the order in which they are received." (Emphasis added.) Once a Request has been accepted, OAL will issue a Determination. There is no legal basis in either statute or regulation for granting the Board's request that OAL withdraw from further consideration of this Request for Determination.¹⁸

III. DISCUSSION OF DISPOSITIVE ISSUES

Having established the challenged rule and discussed the preliminary issue, we note that there are three main issues before us:¹⁹

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."²⁰ Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to that agency.²¹

We are aware of no specific statutory exemption which would permit the Board to conduct rulemaking without complying with the APA.²²

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in the key provision Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule of the state agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

A. A Rule or Standard of General Application or a Modification or Supplement to Such a Rule?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²³ At the very minimum, the rule challenged in this Request is an audit guideline or criterion issued and applied by the Board's audit staff when auditing the members of a particular class of taxpayers -- joint venture participants in joint ventures with asset withdrawals or distributions. The applicability of the "80% completion rule" as an audit guideline or criterion with respect to the members of this particular class of taxpayers makes this challenged rule a standard of general application.

We note that there is definite evidence that the Board's audit staff was, in fact, utilizing the "80% completion rule" as a rule of general application in auditing joint ventures. In connection with the audits of the various Dillingham joint ventures and entities, a sample audit schedule prepared by the Board's audit staff and submitted by the Requester included the comment: "In all cases, need evidence that the distributing venture was 80% complete as of the date of the distribution." Another audit comment reads: "No taxable asset sales. All assets distributed after 80% completion and therefore qualify as exempt liquidating dividends." Furthermore, the Requester states in the Request for Determination that in the audits the following practice was employed:

"If the distribution of the construction equipment occurred prior to 80% completion of the joint venture project, the distributions were not considered tax exempt liquidating dividends, but sales of the construction equipment subject to tax. In every case, the Board accepted as tax exempt liquidating dividends the distribution of construction equipment that occurred after 80% completion of the joint venture project."²⁴ [Emphasis in original.]

In its Response to the Request for Determination, the Board makes two major arguments to support its assertion that the "80% completion rule" is not a "regulation" under Government Code section 11342, subdivision (b). These arguments largely relate to the question of whether the challenged rule is a standard of general application of the agency.

Analysis of the Board's First Argument

The Board asserts that the challenged rule is not a "regulation" because it has not been formally adopted by the

Board itself. The Board's Response characterizes the Audit Manual as merely having been "written by the staff of the Principal Tax Auditor for use by his staff."²⁵ The Response points out that it is the Board, not the audit staff, which has been delegated the duty of administering the Sales and Use Tax law.

In this regard, the Board's Response further argues:

"In reaching a decision on a petition [for redetermination], the Board is in no sense bound by Audit Manual 1004.40(e), or by any other provision of the Audit Manual. The Board may, and often does, decide petitions (or claims for refund) against the recommendation of the audit staff. The legal question before the Board on the Dillingham petitions was whether or not the transfer of assets was a nontaxable liquidating dividend or a taxable sale. Dillingham was free to attack, and did attack, the 80% rule as applied to the particular facts by the auditing staff. The Board could have decided that, under the particular Dillingham facts, there had been a liquidating dividend although less than 80% of the project was completed. Or, under another set of facts, might decide that a taxable sale occurred although 90% of the project was completed before the transfer. In either case, the Board's audit staff objecting that the Audit Manual specified 80% as the dividing line would be to no avail."²⁶

The Board's Response disputes the Requester's claim that the Board members made their finding that tax applied based upon Audit Manual section 1004.40, subdivision (e). The Response states: ". . . [T]o reach the conclusion that the Board's decision was based on an Audit Manual provision which it is highly doubtful was even read is pure speculation."²⁷

Examining the arguments made by the Board in its Response, it is difficult to determine with certainty the degree to which the Board members themselves have formally adopted or are responsible for the Audit Manual. It is also difficult to determine with certainty whether or not the Board members, in making their decisions on the Dillingham audits, looked to or relied upon the particular provision of the Audit Manual here at issue. It is possible that the Board members did make their decisions in the Dillingham audits without reference to the "80% completion rule," relying only upon the "occasional sale" provisions of Revenue and Taxation Code section 6006.5, subdivision (b), and Title 18, CCR, section 1595, subsection (b)(2).

However, the degree to which the Board members are responsible for or have relied upon the Audit Manual is not determinative as to whether the challenged rule is a

standard of general application of the agency. To be a rule of general application of a state agency, a rule need not necessarily be issued, utilized, or enforced by the highest decision-making level of the agency. What is determinative here is that the Board's audit staff clearly used the Audit Manual and particularly the "80% completion rule" as an audit guideline or criterion of general application in auditing taxpayers and in the issuance of "notices of determination." The mere issuance of such notices requires taxpayers to either pay taxes due or go through the lengthy, time-consuming, and potentially expensive "petition for redetermination" process. The use of these Audit Manual provisions by the Board's audit staff alone can have a significant impact upon the taxpaying public, regardless of whether the Board members themselves are responsible for or ultimately rely upon the provisions.

As stated earlier, Government Code section 11347.5, subdivision (a), clearly provides:

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." [Emphasis added.]

The prohibition of Government Code section 11347.5 is essentially on any agency issuance, utilization or enforcement of a rule not adopted under the APA. The prohibition here is broad, not limited to formal actions of the board members of an agency (where an agency has a board). A rule issued, utilized, or enforced by agency staff also falls within the scope of this prohibition.

Furthermore, whether the action of a state agency constitutes a "regulation" hinges largely upon its effect and impact on the public.²⁸ Clearly the issuance, utilization or enforcement of a rule by an agency can affect the public regardless of whether the rule evidences itself at the highest level of an agency (such as a board) or at a staff level within an agency. In the situation here at issue, the issuance and utilization of the challenged Audit Manual provision by the Board's audit staff affects the taxpaying public, subjecting taxpayers to the audit assessment and appeal processes, just as actions by the Board members themselves affect the public. This Audit Manual provision clearly is a rule of general application of the agency and has a regulatory effect upon the public, even

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if the Board members themselves may not be responsible for and do not rely upon the provision.

Although the issuance and utilization of the "80% completion rule" by the Board's audit staff alone is sufficient to make the rule a "standard of general application" of the agency, we note that there is strong evidence that the rule was, in fact, utilized at higher levels within the agency. In the "Decision and Recommendation" reports issued by the Board's hearing officer on April 2, 1987 relating to the Dillingham audits, the hearing officer clearly utilized the "80% completion rule" in reaching his decision. The decision, states, in part:

"Petitioners [the Dillingham entities and joint ventures] have questioned the validity of the Board's position that withdrawals of assets by a member or members of a joint venture prior to 80 percent completion of the venture are sales of the property transferred, as opposed to liquidating dividends, and are therefore subject to tax

". . . The Board's use of the 80 percent completion figure for withdrawals of assets from joint ventures is a long-standing established policy designed to accommodate the unique circumstances of a joint venture. The Board is aware that joint ventures will frequently not need to utilize all of their assets as the project draws to a close. As an accommodation to the peculiar circumstances of an entity formed for a single project, the Board has utilized the 80 percent figure as an analogy to the cessation of business by a partnership with resulting distribution of assets These withdrawals were taxable and did occur prior to 80 percent completion of the projects."²⁹
[Emphasis added.]

Not only does this excerpt from the hearing officer's decision indicate that the hearing officer utilized the "80% completion rule," but the excerpt would also indicate that the Board members themselves had (at least in the past) utilized the "80% completion rule" as a rule of general application.

We cannot determine with certainty whether the Board members themselves utilized the challenged rule in making their decision on the Dillingham petitions for redetermination. In the Request for Determination and the Board's Response, we have no evidence of a decision having been issued by the Board detailing its rationale with respect to the taxability of the joint venture asset withdrawals or distributions. However, if the Board merely "adopted" the "Decision and Recommendation" reports of the hearing officer, that would tend to imply that the Board members themselves adopted the

rationale employed by the hearing officer, including the utilization of the "80% completion rule."

Finally, we would note that the Board's narrow view of the scope of the term "regulation" would have, as its logical consequence, a significant erosion in the applicability of the APA with a resultant decrease in the protections provided by the APA process, including a reduction in the opportunity for public notice and public comment regarding agency rules. The Board argues that an Audit Manual provision is not a "regulation" of the agency since it is not the Board's rule but rather was only written by the staff of the Board's Principal Tax Auditor for use by the audit staff. Applying this principle to state agencies in general, rules issued and used by state agencies at staff levels (not by the rulemaking body or person with ultimate rulemaking authority) would not be considered "regulations." Agencies would be free to issue and use rules at staff levels, potentially with major impacts upon the public, without the protections of the APA process. Clearly this narrow view of the scope of the term "regulation" and the consequent erosion in the applicability of the APA is contrary to the broad prohibition on agency "underground rules" contained in Government Code section 11347.5.

Analysis of the Board's Second Argument

In its Response to the Request for Determination, the Board makes a second argument relating to the question of whether the "80% completion rule" is a "standard of general application" and consequently a "regulation." The Board essentially asserts that the Audit Manual is not binding on the Board's audit staff and therefore not a regulation. In making this argument, the Board cites the first two paragraphs from the Audit Manual entitled "Purpose of Audit Manual." These paragraphs state:

"This manual is to be used as a guide in the making of business tax audits. It incorporates procedures and techniques evolved over a period of years which have proved to be sound and practical. It should be carefully studied by all members of the audit staff in order that audits will be conducted and reports prepared in a uniform manner consistent with approved tax auditing practices.

"The audit manual cannot be a substitute for experience, training in accounting, and auditing or good judgment and supervision. The procedures outlined in the manual are not inflexible. However, all sections of Chapter 2, Field Audit Reports, and the italicized portions of the other chapters are to be followed exactly. Any deviations from these

instructions must be approved by the audit supervisor.³⁰ [Emphasis in original.]

The Board's Response states:

"Audit Manual 1004.40(e), here in question, is not italicized. The auditors need not follow it 'exactly.' The 80% provision is not 'inflexible.' The 80% provision is not a substitute for the auditors' '. . . experience, training in accounting, and auditing or good judgment and supervision.' Nor, we would add, is it a substitute for any contrary advice the auditor would receive from the Board's legal staff during the audit based on the particular facts the auditor found and presented to the legal staff. The Board's legal staff would surely not be bound by an Audit Manual provision to the contrary if faced with a factual situation in which it was clear a liquidation did occur, or did not occur" ³¹ [Emphasis in original.]

The argument in the Board's Response concludes:

"It is this necessity for flexibility, given the peculiar nature of a joint venture, i.e., most joint ventures are formed to complete one project, that has resulted in the Board not submitting the provisions of Audit Manual 1004.40(e) for formal adoption as a regulation. The auditor must consider all of the facts as to the transfer of tangible personal property and, in particular, must consider all evidence relating to whether the transaction was part of a liquidation. The 80% rule would be only one of the factors for consideration." ³² [Emphasis added.]

Examining this argument made by the Board in its Response, OAL must reject the Board's notion that the "80% completion rule" is not a "regulation" because it is not absolutely binding on the audit staff. Even if this rule is merely, as the Board puts it, "one of the factors for consideration" in audits involving joint venture asset withdrawals or distributions, the employment of the rule as a standard "guideline" or "criterion" in audits of joint ventures is enough to make the rule a "standard of general application" and a "regulation." The Board's Response essentially admits that the "80% completion rule" is a criterion employed in these audits. The above-quoted Audit Manual provisions entitled "Purpose of Audit Manual" state that the "manual is to be used as a guide in the making of business tax audits." It is evident that we are dealing here with a criterion or guideline of general application.

As discussed earlier in this Determination, the prohibition in Government Code section 11347.5 on regulations not

adopted pursuant to the APA is very broad, encompassing ". . . any guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule" (Emphasis added.) Since the "80% completion rule" is being employed, at a minimum, as a "guideline" or "criterion" in joint venture audits, clearly this rule is a "standard of general application" prohibited under Government Code section 11347.5, subdivision (a).

In Hillery v. Rushen,³³ a state agency argued that where an administrative problem must be handled "flexibly or in minute detail," it was appropriate for the agency to utilize informal guidelines.³⁴ The Hillery court rejected this argument, noting that no such exemption was provided by the California APA, and concluded that:

"'guidelines' after all, clearly constitute 'standard[s] of general application' within the meaning of California's definition of 'regulation.'" [Citation omitted.]

The Board's "80% completion rule," even if it is not binding, is nevertheless a "guideline" employed in joint venture audits. As indicated above, "guidelines" are "standards of general application" within the meaning of California's definition of "regulation."

Furthermore, as discussed earlier in this Determination, whether the action of a state agency constitutes a "regulation" hinges largely upon its effect and impact on the public.³⁵ Even if the "80% completion rule" is a non-binding "guideline" or "criterion" employed by the Board's auditors in auditing joint ventures, the use of this "guideline" or "criterion" can have a significant effect and impact on the public, resulting, in some cases at least, in the assessment of additional taxes at the audit level and subjecting taxpayers to the "petition for redetermination" appeal process. With this potential effect and impact upon the public, the "80% completion rule" is undoubtedly a "regulation" which needs to be adopted in compliance with APA procedures (including the opportunity for public notice and comment).³⁶

Finally, we would note that it is highly probable that the "80% completion rule" is more than just "one of the factors for consideration" in the audits of joint ventures with asset distributions or withdrawals. While it is true that the Audit Manual indicates that there is some flexibility in the use of the Audit Manual provisions, the reality most likely is that the Board's auditors routinely follow what the Audit Manual says. One stated purpose of the Audit Manual is to ensure that "audits will be conducted and reports prepared in a uniform manner consistent with approved tax auditing practices." (Emphasis added.)

Consistent with this objective of audit uniformity (and because deviation from the Audit Manual provisions is likely to require special justification by auditors), we suspect that the auditors of joint ventures routinely follow the Audit Manual's "80% completion rule" in preparing their audit reports. Certainly the Dillingham audits would indicate a rather routine employment of the "80% completion rule." In reality, the "80% completion rule" is probably, in most cases, more "the rule" than "one of the factors for consideration."

B. A Rule Which Implements, Interprets, or Makes Specific the Law Enforced or Administered by the Agency or Which Governs the Agency's Procedure?

Having established that the "80% completion rule" is a standard of general application, we now inquire whether the challenged rule has been adopted by the Board to implement, interpret, or make specific the law enforced or administered by the Board, or to govern the agency's procedure. The answer to this second part of the two-part "regulation" inquiry is also "yes."

As discussed earlier in this Determination under "Background: Relevant Sales and Use Tax Law," Revenue and Taxation Code section 6367 sets forth a Sales and Use Tax exemption for "occasional sales." Revenue and Taxation Code section 6006.5 defines "occasional sale" to include several different categories of transactions, including the following category in section 6006.5, subdivision (b):

"Any transfer of all or substantially all the property held or used by a person in the course of those activities [activities requiring a seller's permit or permits] when after the transfer the real or ultimate ownership of the property is substantially similar to that which existed before the transfer"

This "occasional sales" exemption has been implemented, interpreted, or made specific in Title 18, CCR, section 1595, entitled "Occasional Sales--Sale of a Business--Business Reorganization." Of particular relevance here, section 1595, subsection (b)(2), "Transfers of Substantially All Property Without Substantial Change in Ownership," implements Revenue and Taxation Code section 6006.5, subdivision (b).

A review of regulation section 1595, subsection (b)(2), indicates that the Board has formally adopted regulatory provisions which provide substantial guidance regarding the "occasional sale" exemption in Revenue and Taxation Code section 6006.5, subdivision (b). Of particular note, the regulation sets forth two "80% rules" for "transfers of

substantially all property without substantial change in ownership," generally requiring:

- (1) a transfer of substantially all (80% or more) of the tangible personal property held or used in the course of activities, and
- (2) ownership of the property after the transfer which is substantially similar to that which existed before the transfer (80% or more of the ultimate ownership unchanged).

Despite the guidance provided in regulation section 1595, the regulation is absolutely silent with respect to the treatment of joint venture asset transfers. There are no specific rules set forth regarding joint venture asset distributions or withdrawals.

It is Audit Manual section 1004.40, subdivision (e), which details specific rules regarding the handling of joint ventures in the context of "Occasional Sales-- Sale of a Business." Here is stated the "80% completion rule" for joint venture asset distributions or withdrawals -- "Withdrawals of assets by a member or members of a joint venture prior to 80 percent completion of the venture are sales of the property transferred and are not liquidating dividends and hence are subject to the tax." This "80% completion rule" particular to joint ventures is separate and distinct from the two "80% rules" set forth in regulation section 1595, subsection (b)(2).

The "80% completion rule" for joint ventures in Audit Manual section 1004.40, subdivision (e), augments what has already been set forth in regulation section 1595. The "80% completion rule" constitutes a further implementation, interpretation, or making specific of the "occasional sale" exemption contained in Revenue and Taxation Code section 6006.5, subdivision (b).

Since the "80% completion rule" implements, interprets or makes specific Revenue and Taxation Code section 6006.5, subdivision (b), this rule satisfies the second part of the two-part "regulation" inquiry. The "80% completion rule" is "a rule which implements, interprets, or makes specific the law enforced or administered by the agency or which governs the agency's procedure."

WE THEREFORE CONCLUDE THAT the Board's challenged "80% completion rule" is a "regulation" as defined in Government Code section 11342, subdivision (b).

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THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

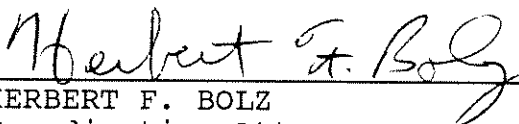
Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.³⁷ Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.³⁸ However, none of the recognized general exceptions (set out in note 38) apply to the challenged rule.³⁹

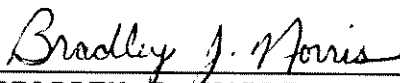
IV. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) the rule contained in section 1004.40, subdivision (e), of the Board's Audit Manual -- providing that withdrawals of assets by a member or members of a joint venture prior to 80 percent completion of the venture are sales of the property transferred and are not liquidating dividends and hence subject to Sales and Use Tax -- is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) this rule does not fall within any established general exception to APA requirements; and therefore
- (4) this rule violates Government Code section 11347.5, subdivision (a).

DATE: March 23, 1990


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1. This Request for Determination was filed by Associated Sales Tax Consultants, Inc., (President: Abe Golomb, Tellus Building, 3353 Bradshaw Road, Suite 106, Sacramento, CA 95827, (916) 369-1200) on behalf of Dillingham Construction Corporation, other related Dillingham entities and joint ventures, and Associated Sales Tax Consultants. The State Board of Equalization (1020 N Street, Sacramento, CA 95814, (916) 445-4956) was represented by Cindy Rambo, Executive Director.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "170" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

- (1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449, the Second District Court of Appeal -- citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) -- refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in

an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a ['']regulation,[''] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Reflecting OAL's special expertise in deciding whether or not particular agency rules are subject to California APA requirements, regulatory determinations issued pursuant to Government Code section 11347.5 are--for five reasons--entitled to great weight in judicial proceedings. These five

reasons are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384. See also Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight).

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No comments from third parties were submitted in this proceeding.

The Board of Equalization's Response to the Request for Determination was received by OAL on February 13, 1990 and was considered in this Determination proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

9. In finding that the Board's "80% completion rule" violates Government Code section 11347.5, subdivision (a), OAL is not expressing an opinion with regard to the particular taxpayer audits which led to the filing of this Request for Determination (and which are currently in litigation).
10. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

11. Revenue and Taxation Code section 6006, subdivision (a).
12. Request for Determination, page 1.
13. Specific evidence of the application of the "80% completion rule" by the Board's audit staff is discussed later in the Determination in Section III, "DISCUSSION OF DISPOSITIVE ISSUES."
14. According to the materials submitted by the Board in its Response to the Request for Determination, the following Dillingham entities and joint ventures filed lawsuits against the Board in Sacramento Superior Court on the dates specified below:
 - a. Dillingham Heavy Construction, Inc. and Guy F. Atkinson Company, a California joint venture known as "Auburn Constructors -- Warm Springs Project," complaint filed on May 30, 1989.
 - b. Dillingham Heavy Construction, Inc., Guy F. Atkinson Company and The Arundel Corporation, a California joint venture known as "Auburn Constructors -- Warm Springs Project," complaint filed July 6, 1989.
 - c. Dillingham Heavy Construction, Inc., Guy F. Atkinson Company and The Arundel Corporation, a California joint venture known as "Auburn Constructors -- Sugar Pine Project," complaint filed July 6, 1989.
15. California Regulatory Notice Register 90, No. 1-Z, January 5, 1990, p. 32.
16. Board Response, p. 4.
17. Id.
18. When the regulations governing OAL Determinations (under Government Code section 11347.5) were first drafted in 1985, the originally-proposed regulatory scheme would have allowed (or required) OAL to reject (or withdraw from) certain Requests for Determination. The regulations noticed for "45-day public comment" provided for an initial OAL review and screening of Requests for Determination. Upon receipt of a Request, OAL was to review the Request and grant or deny it

within 15 days (originally proposed regulation section 142). Specific factors to be taken into consideration by OAL in its initial review and screening were set forth in the regulations (originally proposed regulation section 143).

Of particular interest here, a regulation was proposed (originally proposed regulation section 144) which would have provided the following:

"OAL shall not grant or continue consideration of a request for determination where the following circumstances exist:

- (a) The request for determination was submitted by a person, or on behalf of a person, who is a party in a pending court or adjudicatory proceeding; and
- (b) At issue in the proceeding is the question of whether the state agency rule, is a regulation as defined in Government Code section 11342(b)."

In response to the public notice of these regulations, OAL received a number of public comments unfavorable to these proposals. Interestingly, the Board was one of the State agencies which submitted public comments regarding proposed regulation sections 142, 143, and 144, and was critical of proposed regulation section 144. In fact, the Board at that time specifically opposed the section 144 limitation which would have required OAL to reject or withdraw from consideration of Requests for Determination where there was a pending court or adjudicatory proceeding involving the same "regulation" issue. (See letter dated June 17, 1985 from Douglas D. Bell, Executive Secretary of the Board, to Roseann C. Stevenson, Chief Deputy Director and General Counsel of OAL, transmitting a memorandum dated June 14, 1985 with the Board's written comments regarding the proposed OAL regulations).

In response to the public comments received from the Board and other public commenters, OAL eliminated proposed regulation sections 142, 143, and 144. The Determinations regulations were modified to provide that all Requests for Determination which meet the content and filing requirements shall be considered in the order received.

19. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

20. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
21. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
22. In its Response to the Request for Determination, the Board does not question the general applicability of the APA to the Board's Sales and Use Tax rulemaking activities. In fact, the Board's Response (on page 2) includes the following statement:

"As the OAL is well aware, the Board often has proposed a regulation, or an amendment to a regulation, [and submitted it] to OAL for approval. . . . The Board is, therefore, well aware of the legislative mandate which OAL is fulfilling, particularly as to public participation, and wishes to cooperate with OAL wherever possible."

A review of the California Regulatory Notice Register indicates that the Board has an active program of proposing Sales and Use Tax regulations (and regulatory amendments) under APA procedures. Each year, OAL reviews numerous Sales and Use Tax regulation filings submitted by the Board. The general applicability of the APA to the Board's quasi-legislative enactments is well-established both in law and in practice.
23. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
24. Request for Determination, p. 2.
25. Board Response, p. 6.

26. Id., p. 7.
27. Id.
28. See, for example, Winzler & Kelly v. Department of Industrial Relations (1981), 121 Cal.App. 3d 120, 128, 174 Cal.Rptr. 744, 747.
29. In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of: Dillingham Heavy Construction, Inc., et al. dba Auburn Constructors-Sugar Pine Project, Decision and Recommendation of Hearing Officer, April 2, 1987, pp. 10-11.
30. Board of Equalization Audit Manual, section 0101.05, cited in the Board's Response, pp. 7-8.
31. Board Response, p. 8.
32. Id.
33. (9th Cir. 1983) 720 F.2d 1132.
34. Id., at pp. 1135-1136.
35. Winzler & Kelly v. Department of Industrial Relations, supra.
36. If the "80% completion rule" is, as the Board asserts, "only one of the factors for consideration" in auditing joint venture asset distributions or withdrawals, that situation does not preclude the adoption of a regulation covering this area. A regulation could be adopted listing the various criteria which the Board (or the Board's audit staff) utilize in analyzing joint venture asset distributions or withdrawals for taxability, including the "80% completion rule" as one of the criteria.
37. Government Code section 11346.
38. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization (Gov. Code, sec. 11342, subd. (b).)
- d. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- e. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913,

926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation" -- rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation," or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5.

The above listing is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

39. The exception for "legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization" (Gov. Code, sec. 11342, subd. (b)) does not apply to the "80% completion rule" here at issue. For a discussion of the "legal rulings of counsel" exception, see 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986,

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Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-10, B-26--B-28; typewritten version, pp. 15-17.

In its Response to the Request for Determination, the Board does not contend that the exception for "legal rulings of counsel" is applicable to the rule at issue in this Determination.

40. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.